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Case No. 98-1147

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1998

WILLIAM VAN POYCK, *Petitioner*

vs.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENZIO
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0656879

OFFICE OF THE ATTORNEY GENERAL
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL 33401-2299
(561) 688-7759

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. WHETHER PETITIONER HAS PROPERLY EXHAUSTED THIS CLAIM IN STATE COURT BELOW. (Petitioner's Question I restated).

II. WHETHER THIS COURT SHOULD REVIEW A STATE COLLATERAL PROCEEEDING WHERE PETITIONER DOES NOT FAIRLY PRESENT ANY FEDERAL QUESTION SINCE THE JURORS COMPLAINED ABOUT WERE NOT CONSTITUTIONALLY OBJECTIONABLE (Petitioner's questions II and III restated).

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS . . . . . iv-vi

OPINION BELOW 1

CONSTITUTIONAL PROVISIONS 1

JURISDICTION 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

REASONS FOR DENYING THE WRIT 3

QUESTION I 3

I. WHETHER PETITIONER HAS PROPERLY EXHAUSTED THIS CLAIM IN STATE COURT BELOW. (Petitioner's Question I restated).

QUESTION II 6

II. WHETHER THIS COURT SHOULD REVIEW A STATE COLLATERAL PROCEEDING WHERE PETITIONER DOES NOT FAIRLY PRESENT ANY FEDERAL QUESTION SINCE THE JURORS COMPLAINED ABOUT WERE NOT CONSTITUTIONALLY OBJECTIONABLE.
(Petitioner's questions II and II restated).

CONCLUSION 13

TABLE OF CITATIONS

Cases

Page(s)

Adams v. Robertson,
520 U.S. 83 (1997).....6,8

Bertolotti v. Dugger,
883 F.2d 1503 (11th Cir. 1989).....9

Board of Directors of Rotary Int'l
v. Rotary Club of Duarte,
481 U.S. 493 (1981).....6

Cardinale v. Louisiana,
394 U.S. 437 (1969).....5,8

Chandler v. Dugger,
634 So.2d 1066 (Fla. 1994).....4

Coleman v. Thompson,
501 U.S. 722 (1991).....8

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991).....8

Ferguson v. Singletary,
632 So.2d 53 (Fla. 1993).....9

Georgia v. McCollum,
505 U.S. 42 (1992).....8

Groover v. Singletary,
656 So.2d 424 (Fla. 1995).....2,12

J.E.B. v. Alabama,
511 U.S. 127 (1994).....8

Jackson v. Dugger,
931 F.2d 712 (11th Cir. 1991).....9,12

Jefferson v. State,
595 So.2d 38 (Fla. 1992).....8

Jones v. Barnes,
463 U.S. 745 (1983).....9

Medina v. Dugger,
586 So.2d 317 (Fla. 1991).....9

Morgan v. Illinois,
504 U.S. 719 (1992).....6,11

Pentecost v. State,
545 So.2d 861(Fla. 1989).....7

Ross v. Oklahoma,
487 U.S. 81 (1988).....5-6

Sochor v. Florida,
504 U.S. 527 (1992).....8

Strickland v. Washington,
466 U.S. 668 (1984).....9

Trotter v. State,
576 So.2d 691 (Fla. 1990).....7

Van Poyck v State,
560 So.2d (Fla. 1990).....3

Van Poyck v. Singletary,
715 So.2d 930 (Fla. 1998).....1,3,9,11

Van Poyck v. State,
694 So.2d 686 (Fla)
cert denied,
___U.S. ___, 118 S. Ct. 559,
139 L.Ed.2d 400 (1997).....3

Wainwright v. Witt,
469 U.S. 421 (1985).....10

Webb v. Webb,
451 U.S. 493 (1981).....5,8

Williamson v. Dugger,
651 So.2d 84 (Fla. 1994).....4

ADDITIONAL AUTHORITIES:

28 U.S.C. 1257 and Rule 10(c).....1

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TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion below has been reported as Van Poyck v. Singletary, 715 So. 2d 930 (Fla. 1998).

CONSTITUTIONAL PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. § 1257 and Rule 10(c). Section 1257(a) is the appropriate provision to the extent that the central issue in this petition is whether petitioner received effective assistance of appellate counsel as guaranteed to him under the United States Constitution. However, petitioner cannot demonstrate that this

Court should exercise its discretion to review this claim.

Nor can jurisdiction be found under Rule 10(c) since petitioner cannot demonstrate that there is any conflict between the opinion of the Florida Supreme Court and "relevant decisions of this Court." **Petition at 3.**

STATEMENT OF THE CASE

The Florida Supreme Court entered its opinion on May 14, 1998. A motion for rehearing was denied on August 7, 1998. Petitioner is now seeking certiorari review in this Court.

STATEMENT OF THE FACTS

Respondent rejects Petitioner's statement of the facts as it contains a slanted and somewhat inaccurate version of the facts. Petitioner's attempt to bolster that rendition with inappropriate editorialization also warrants a rejection of same. A rendition of the facts germane to resolution of this claim appears in the Florida Supreme Court opinion. **Petitioner's appendix at A1-14**; Van Poyck 715 So. 2d at 931. An accurate recount of how the issue under review was presented to the Florida Supreme Court appears in the Respondent's appendix A. Also included in appendix B to the state's response is Van Poyck's motion for rehearing. Finally, the Respondent's appendix C contains excerpts from the original record on appeal, which include the voir dire responses of jurors Moody and Bradford.

REASONS FOR DENYING THE WRIT

QUESTION I

WHETHER PETITIONER HAS PROPERLY EXHAUSTED THIS CLAIM IN STATE COURT BELOW. (Petitioner's Question I restated).

As noted above, petitioner was convicted of, and sentenced to death for, the first-degree murder of correctional officer Fred Griffis. On appeal, petitioner challenged the competency of two jurors Brushci and Abramis. The Florida Supreme Court denied this claim since neither juror ultimately sat, and since both were excused *sua sponte* by the trial court; therefore, the issue became moot. Van Poyck, 560 So. 2d at 560/1066,1070 (Fla. 1990). Petitioner then unsuccessfully challenged his conviction and sentence in a motion for postconviction relief. Van Poyck v. State, 694 So. 2d 686 (Fla.), cert. denied, __ U.S. __, 118 S.Ct. 559, 139 L. Ed. 2d 400 (1997). He also unsuccessfully challenged the effectiveness of appellate counsel in a habeas petition to the Florida Supreme Court. Therein, petitioner accused appellate counsel of failing to properly present on appeal an issue regarding the trial court's erroneous denial of seven challenges for cause. Van Poyck v. Singletary, 715 So.2d 930 (Fla. 1998). It is the denial of that claim in state court that provides petitioner's basis for certiorari review here.

At trial, petitioner challenged for cause the following potential jurors: Ms. Busto, Ms. Moker, Mr. Carter, Mr. Nickerson, Mr. Miller, Mr. Farmer, and Mr. Aldridge. **Petitioner's appendix at A4-12**; Van Poyck, 715 So. 2d at 933. In his state habeas petition, although Van Poyck conceded that he struck all seven jurors with peremptory challenges, he

contended that the trial court improperly denied his challenges for cause, thereby forcing him to accept two objectionable jurors: Ms. Moody and Mrs. Bradford. He did not, however, argue how either Ms. Moody or Mrs. Bradford was objectionable. Rather, he merely alleged that he had preserved his argument for review by challenging Moody and Bradford for cause and by alleging that he would have stricken them peremptorily if he had not had to use his peremptories to strike the seven other objectionable jurors. In fact, Van Poyck concluded his argument to the Florida Supreme Court as follows:

> This undermines any confidence in the appellate process and mandates either a new trial (as to those jurors who expressed a belief in Mr. Van Poyck's guilt: Busto, Farmer and Aldridge) or sentencing hearing (as to those jurors who were biased towards the death penalty: Busto, Moker, Carter, Nickerson, Miller and Farmer). The trial court's error in refusing to grant a challenge for cause can never be harmless error.

Respondent's appendix at A24. Ultimately, in denying his state habeas petition, the Florida Supreme Court held, "In conclusion, we find that Van Poyck's appellate counsel did not render ineffective assistance for failing to pursue and argue Van Poyck's claim that the other seven venirepersons were biased or prejudiced. See Williamson v. Dugger, 651 So.2d 84, 86 (Fla.1994); See Chandler v. Dugger, 634 So.2d 1066, 1068 (Fla.1994)." **Petitioner's appendix at A15**; Van Poyck, 715 So. 2d at 934.

Petitioner now contends, however, that the Florida Supreme Court's analysis should have focused on the competency of Moody and Bradford, and not on the

competency of the other seven jurors. Petitioner accuses the Florida Supreme Court of misapplying the principles of Ross v. Oklahoma, 487 U.S. 81 (1988), by strictly reviewing the trial court's denial of cause challenges for the seven jurors whom petitioner ultimately excused with peremptory challenges.

Petitioner's complaint regarding the Florida Supreme Court's treatment of the issue, however, is disingenuous. Petitioner's state habeas petition focused exclusively on the seven jurors whom he initially challenged for cause and later excused peremptorily. He did not recount the actual responses of the two jurors who actually sat: Moody and Bradford. Nor did he allege in any way that they were "objectionable." **Respondent's appendix at A3-A24.** The pleadings filed bytr petitioner make it evident that the Florida Supreme Court addressed the issue in the identical fashion as it was presented in the petition.[1]

Van Poyck cannot now complain to this Court that the state supreme court's analysis was flawed. Any attempt to allege error by the state supreme court as a rationale for review in this petition borders on the frivolous. More importantly, his failure to raise the same argument in the state supreme court that he raises in this Court precludes this Court's review. This Court has repeatedly stated that review of state court judgments pursuant to 28 U.S.C. § 1257 will be precluded if the federal claim has not been fairly presented to the state court. Cardinale v. Louisiana, 394 U.S. 437 (1969); Webb v. Webb, 451 U.S. 493, 495 (1981); Adams v. Robertson, 520 U.S. 83 (1997);

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[1] Petitioner's motion for rehearing before the Florida Supreme Court also did not point out to the court that its analysis was allegedly flawed under Ross v. Oklahoma 487 U.S. 81 (1988). In fact, Ross was not mentioned anywhere in either the state habeas petition or the motion for rehearing. **Respondent's appendix A and B.**

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 493 (1981). Since petitioner failed to adequately present the requisite federal issue in state court, this Court lacks jurisdiction and must deny this petition.

QUESTION II

II. WHETHER THIS COURT SHOULD REVIEW A STATE COLLATERAL PROCEEDING WHERE PETITIONER DOES NOT FAIRLY PRESENT ANY FEDERAL QUESTION SINCE THE JURORS COMPLAINED ABOUT WERE NOT CONSTITUTIONALLY OBJECTIONABLE (Petitioner's questions II and II restated).

In his final two issues, Van Poyck alleges that review is warranted because (1) the instant case presents an opportunity for this Court to address an issue that it left undecided in Ross v. Oklahoma, 487 U.S. 81, 90 n. 4 (1988); and (2) petitioner's jury contained "two jurors who were unalterably in favor of the death penalty" in violation of both Ross and Morgan v. Illinois, 504 U.S. 719 (1992). Review is not warranted for the following reasons. First, the rhetorical question posed by this Court over ten years ago in Ross does not apply in the instant case. Therein, this Court reemphasized long-standing precedent that peremptory challenges are not constitutionally protected. Ross, 487 U.S. at 88. Ross had claimed that he had been "forced" to use a peremptory strike on a juror, after the trial court had erroneously refused to excuse the juror for cause. Id. at 85. According to this Court, Ross was not entitled to federal relief, however, because he was unable to demonstrate that any of the jurors who actually sat were in any way biased or otherwise incompetent. Id. In rejecting Ross's argument that he was unfairly required to use a peremptory

strike, this Court refused to attach any constitutional significance to the allotment of peremptory challenges. In fact, the Court recognized a state's right to require defendants to use peremptory challenges to cure a trial court's erroneous denial of cause challenges. Id. at 90. This Court further stated, "[I]t is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise." Id.

In a footnote seized upon by Van Poyck, this Court allegedly left open the question of whether a free-standing federal constitutional right to peremptory challenges would exist if such challenges were created under a state system that did not include any limitation on their use or purpose. In other words, if a state grants to a defendant the absolute freedom and unfettered discretion to the use of peremptory challenges, then the broader question "may" become: Under what circumstances would a defendant be denied federal due process if he or she were forced to use a peremptory challenge because of trial court error? Id. at 90-92 & n.4. Petitioner claims that the instant case presents the opportunity to address this broader question.

Fatal to petitioner's argument, however, is that Florida law does, in fact, place restrictions on the use of peremptory challenges. To preserve an issue regarding the erroneous denial of challenges for cause, a defendant must exhaust all of his peremptory challenges, request additional strikes, and identify the jurors whom he would strike with the additional challenges. If his request is then denied, a defendant must demonstrate on appeal that the panel contained an objectionable juror. Pentecost v. State, 545 So. 2d 861, 863 n.1 (Fla. 1989); Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990). Florida law makes clear that peremptory challenges are simply a means to an end and do not possess any constitutional significance in and

of themselves. See Jefferson v. State, 595 So. 2d 38 (Fla. 1992) (right to impartial jury is constitutionally protected rather than right to use of peremptory challenges). As such, this Court must reject petitioner's invitation to address the question allegedly left open in Ross, since a defendant in Florida does not enjoy the unfettered freedom to the use of peremptory challenges as petitioner contends.[2]

Second, there exists two separate independent and adequate state grounds that warrant a denial of any further review. Any federal constitutional challenge to jurors Bradford and Moody was never fairly presented below.[3] Consequently, failure to afford the state court an opportunity to address the issue precludes review before this Court. See Cardinale v. Louisiana, 394 U.S. 437, (1969) (finding that review of state court judgments pursuant to 28 U.S.C. § 1257 is precluded if the federal claim not fairly presented to the state court); Webb v. Webb, 451 U.S. 493, 495 (1981) (same); Adams v. Robertson, 520 U.S. 83 (1997). Also, any challenge to juror Bradford is further barred since the issue was not preserved at trial and, therefore, procedurally barred before the Florida Supreme Court. **Petitioner's appendix at A3 n. 3.** This additional procedural defect precludes review in this Court. See Sochor v. Florida, 504 U.S. 527 (1992) (finding state procedural bar constitutes an independent and adequate state ground which precludes federal review); Coleman v. Thompson, 501 U.S. 722 (1991) (same).

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[2] Nor can there be any question that this Court has consistently determined since Ross that peremptory challenges are not constitutionally protected. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991); Georgia v. McCollum, 505 U.S. 42, 57 (1992); J.E.B. v. Alabama, 511 U.S. 127, 137 n.7 (1994).

[3] See respondent's argument to Question I.

Without waiving the dispositive arguments presented above, respondent will address the merits of the claim. As noted in Question I, the claim as presented in state court alleged that appellate counsel was ineffective for failing to challenge the trial court's erroneous denial of seven challenges for cause. As already stated above, and conceded by petitioner, any challenge to a trial court's denial of a challenge for cause must focus on the jurors who actually sat. Ross, 487 U.S. at 86. Therefore, in the instant petition, Van Poyck must demonstrate that counsel's failure to challenge the competency of jurors Bradford and Moody resulted in both deficient performance and prejudice under the requirements of Strickland v. Washington, 466 U.S. 668, 687 (1984).

A review of the record and of the Florida Supreme Court's opinion demonstrates that petitioner cannot establish his claim. First, petitioner fails to acknowledge the Florida Supreme Court's finding that any challenge to the competency of juror Bradford had been waived by trial counsel's failure to preserve the issue for appeal. Van Poyck, 715 So. 2d at 931, n.3. It is axiomatic that appellate counsel cannot be deemed ineffective for failing to pursue an issue that was not preserved at trial. Jackson v. Dugger, 931 F. 2d 712, 715 (11th Cir. 1991); Bertolotti v. Dugger, 883 F.2d 1503, 1523 (11th Cir.1989); see also Groover v. Singletary, 656 So. 2d 424 (Fla. 1995); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991); cf. Jones v. Barnes, 463 U.S. 745, 751-753 (1983)(finding that effective appellate counsel is not required to raise every conceivable issue).

Second, petitioner fails to present to this Court any of the actual responses given by jurors Bradford and Moody. Rather, he devotes all of the factual recitation to the irrelevant responses of the seven potential jurors who never sat. **Petition**

at 7-17. Even if he were to establish that the trial court should have granted any or all of his seven challenges for cause, petitioner does not demonstrate how jurors Moody and Bradford were incompetent to sit under the requirements of Ross and Wainwright v. Witt, 469 U.S. 421 (1985). Consequently, as presented, petitioner has failed to even present this Court with a federal question to review. Ross, 487 U.S. at 88 (ruling that there is no federal constitutional right to peremptory challenges).

Third, Van Poyck argues that he is entitled to relief because jurors Moody and Bradford were unalterably in favor of the death penalty. Jurors who express such fixed views of the death penalty, he claims, must be excused for cause. Morgan v. Illinois, 504 U.S. 719 (1992). This argument, however, is both factually and legally incorrect. Both jurors stated that, although they were in favor of the death penalty, neither would automatically vote for it. Ms. Moody never expressed any difficulty in being able to render a fair and impartial verdict. She stated that she would not prejudge the case, but rather would decide the case based on the evidence presented. (R 509). She consistently and unequivocally stated that she would follow the law and would not automatically recommend the death penalty.[4] (R 511-514). **Respondent's appendix at C11-21.** Likewise, Ms. Bradford stated that she had no preconceived notion of guilt; the case should be tried in the courtroom and not in the media. (R 866). She indicated that her opinion about the appropriateness of the death penalty depended on the facts of the case and although she favored the

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[4] Petitioner did not challenge Ms. Moody for cause at the time she gave her responses. It was not until after Van Poyck used all of his available peremptory strikes that he mentioned Moody as someone he wanted to remove either for cause or peremptorily.

death penalty she would not automatically recommend death.[5] (R 871). **Respondent's appendix at C1-C10.**

Neither Bradford nor Moody expressed opinions similar to those of the jurors in Morgan, upon which petitioner relies.[6] This Court granted relief in Morgan based on the trial court's refusal to allow the defendant an opportunity to conduct further voir dire of certain jurors based on the initial responses. Morgan, 504 U.S. at 736. According to this Court, given those jurors' extreme sentiments in favor of the death penalty, the defendant should have been permitted to question them further.

In the instant case, Van Poyck was never precluded from questioning Moody, Bradford, or any other juror, regarding their views on the death penalty. And the record does not support any explicit or implicit allegation to the contrary. Consequently, Morgan offers no support for petitioner's claim.

In conclusion, this Court must deny review. Both jurors expressed unequivocal assertions that they would follow their oath as jurors and decide this case strictly on the evidence presented. The law requires no more. See Witt, 469 U.S. at

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[5] Trial counsel did not use an available peremptory strike to remove Bradford at the time she gave her responses, nor did he identify Bradford as someone he would strike if he were given an additional peremptory challenge.

[6] Although petitioner also relies on the Florida Supreme Court's dissenting opinion in his case for support, he fails to point out that the dissenters determined that juror Moody's responses did not warrant a challenge for cause. **Petitioner's appendix at A26 n.6**; Van Poyck v. Singletary, 715 So. 2d 930, 934 n.6. The dissenters also noted that any challenge regarding Bradford was procedurally barred. Id. n.3.

424. Therefore, appellate counsel was not ineffective for failing to question the competency of either juror Moody or Bradford. See Chandler v. State, 634 So. 2d 1066, 1068 (Fla. 1993) (rejecting claim of ineffective assistance of appellate counsel because counsel is not expected to raise nonmeritorious claims); Groover v. Singletary, 656 So. 2d 424 (Fla. 1995) (same); Jackson v. Dugger, 931 F. 2d 712, 715 (11th Cir. 1991).

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENZIO
Assistant Attorney General
Florida Bar No. 0656879

OFFICE OF THE ATTORNEY GENERAL
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

COUNSEL FOR RESPONDENT

INDEX TO APPENDIX

Petitioner's State Habeas Petition	A1-A24
Petitioner's Motion for Rehearing to State Habeas	B1-B6
Record on Appeal, FSC Case No. 89,870	C1- C21

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK, Petitioner, v. HARRY K. SINGLETARY, JR., Secretary, Florida Department of Corrections, Respondent.	)	Case No. 89,870

PETITION FOR EXTRAORDINARY RELIEF
AND FOR WRIT OF HABEAS CORPUS

GERALD S. BETTMAN, ESQUIRE
Florida Bar No. 290661
1027 Blackstone Building
233 East Bay Street
Jacksonville, FL 32202
(904) 354-5262

JEFFREY O. DAVIS
MITCHELL S. MOSER
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, WI 53202
Attorneys for Petitioner
(414) 277-5000

GROUNDS FOR HABEAS RELIEF

I. MR. VAN POYCK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON HIS DIRECT APPEAL WHEN APPELLATE COUNSEL FAILED TO ADEQUATELY RAISE THE ISSUE OF THE TRIAL COURT'S ERROR IN REFUSING TO GRANT DEFENSE CHALLENGES FOR CAUSE REGARDING JURORS WHO INDICATED THAT THEY WOULD AUTOMATICALLY VOTE FOR DEATH, AND WHO WERE CONVINCED OF MR. VAN POYCK'S GUILT, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Mr. Van Poyck's first claim is based on the fundamental Sixth and Fourteenth Amendment premise that a defendant in a capital case is entitled to have that case heard by a jury with no preconceived notions of guilt or personal views that death is always the appropriate sentence for one convicted of first degree murder. Such jurors must be struck for cause. It is reversible constitutional error if they are not --even if the juror or jurors do not sit on the panel, so long as the defendant then uses a peremptory strike on that juror or jurors and then does not have one available to strike another objectionable juror. That circumstance occurred here. Unfortunately, for Mr. Van

Poyck, his appellate counsel named the wrong juror, then compounded the problem by failing to articulate a coherent argument on the issue, cite any relevant authority or engage in any analysis whatsoever.

A. The Trial Court Committed Reversible Error Denying For Cause Challenges To Impartial Jurors, Thereby Requiring Mr. Van Poyck To Use Peremptory Challenges And Then Denying Additional Requested Peremptory Challenges.

As a starting point, a review of the underlying legal error involved is in order. A juror must be struck for cause if so challenged and "there is basis for any reasonable doubt as to any jurors possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial ...." Singer v. State, 109 So. 2d 7, 24 (Fla. 1959) (emphasis added). If a potential juror demonstrates a bias toward the death penalty, the juror must be excused even if he later states that he would follow the court's instructions and the law. See, e.g., Bryant v. State, 656 So. 2d 426, 428 (Fla. 1995); Floyd v. State, 569 So.2d 1225, 1230 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991); Hill v. State, 477 So. 2d 552, 555 (Fla. 1985). Similarly, a court must strike for cause a juror who does not presume the defendant innocent or who expects the defendant to produce evidence of his innocence, again even if he later says he will follow the Court's instructions. See, e.g., Hamilton v. State, 547 So.2d 630, 632 (Fla. 1989); Huber v. State, 669 So.2d 1079,1081 (Fla. 4th DCA 1996); Perea v. State, 657 So. 2d 8, 9 (Fla. 3d DCA), rev. denied, 662 S.2d 632 (Fla. 1995).

It is per se reversible error for the court to erroneously deny a for cause challenge if the defendant then uses a

peremptory challenge to strike the juror, eventually exhausts his peremptory challenges and asks for, but is denied, an additional peremptory challenge. Trotter v. State, 576 So.2d 691, 693 (Fla. 1991). The defendant must identify a juror that he found objectionable who sat on the jury after the court denied his request for an additional peremptory challenge. The juror need only be somehow objectionable--the defendant need not show that the juror should have been struck for cause. Id., Diaz v. State, 608 So.2d 888, 890 (Fla. 3d DCA 1992), rev. denied, 613 So. 2d 9 (Fla 1993). In the case at bar, two such objectionable jurors eventually sat on Mr. Van Poyck's jury: Goldie Moody and Mary Bradford. Both were challenged for cause, unsuccessfully, and both sat on the jury because Mr. Van Poyck was forced to expend his peremptory challenges on other jurors who should have been excused for cause.

1. The Trial Court Erroneously Denied For Cause Challenges To Pro-death Jurors And Jurors Who Did Not Presume Mr. Van Poyck To Be Innocent.

During jury selection in this matter, Mr. Van Poyck moved to strike for cause several potential jurors, which challenges the Court denied. Mr. Van Poyck was then forced to use peremptory challenges on the venirepersons who had demonstrated a bias for the death penalty and/or a presumption of Mr. Van Poyck's guilt. Specifically, Wilma Busto evidenced a clear bias for the death penalty and said she would require Mr. Van Poyck to submit evidence of his innocence:

THE COURT: Do you feel that you, personally, could sit on a jury and hear the evidence and hear my instructions on the law and follow them and personally make a recommendation of death?

MS. BUSTO: Yes.

THE COURT: Do you feel in the alternative that you could personally recommend life?

MS. BUSTO: No.

THE COURT: You think you would recommend death in all cases?

MS. BUSTO: If I considered that the person is a criminal then --

R. 724-25.

* * * *

THE COURT: Suppose an aggravated factor, that aggravated factor is presented, can you conceive of an aggravating factor of somebody having a prior record, being a criminal, would you conceive of a case where you would bring back a life recommendation even with that aggravating factor knowing the person is a criminal?

MS. BUSTO: No. If he's already a criminal, he's going to be a criminal. That's the way I think about it.

MR. KLEIN: Only appropriate sentence in a case where somebody like that who's already criminal would be death.

MS. BUSTO: Yeah.

R. 728-29.

* * * *

MR. KLEIN: Would you, if you knew that, let's put it this way, Miss Busto, would you make me present any evidence on behalf of the defendant to prove that --

MS. BUSTO: Yes.

MR. KLEIN: -- that he was innocent?

MS. BUSTO: Yes. I would like to see some proof, yes.

R. 730. This exchange is indistinguishable from the voir dire in Hill, 477 So.2d at 555, where the Court found the trial court erred by not striking the juror for cause. See also Hamilton v. State, 547 So.2d 630, 632 (Fla. 1989) (juror who said she would require the defendant to present evidence to demonstrate he was not guilty should have been struck for cause). The Court here denied the defendant's challenge for cause, R. 733, forcing him to strike Ms. Busto from the panel with a peremptory challenge. R. 1344.

Linda Moker also demonstrated an unacceptable bias for the death penalty:

MR. KLEIN: Suppose the case involves the shooting of a police officer or prison guard. Would you think that that kind of first degree murder if it was done in premeditation would automatically warrant the death penalty?

S. MOKER: Yes, I believe so.

MR. KLEIN: Are any circumstances that you can think of under which you would not recommend the death

penalty other than that kind of case involving a premeditated killing of a police officer or a prison guard?

MS. MOKER: Premeditated, no, I don't think so.

MR. KLEIN: Do you feel strongly about that? How strongly is that belief?

MS. MOKER: Quite strong.

* * * *

R. 641-42. Mr. Van Poyck challenged Ms. Moker for cause, which the Court denied, R. 1131, forcing the defense to use another peremptory challenge. R. 1131-32.

Similarly, Charles Carter evidenced a pro-death penalty bias:

MR. DUBINER: If you found someone guilty of premeditated first degree murder and let me even add something else, premeditated first degree murder of a police officer or prison guard would you think that the death penalty would be an appropriate penalty in that case?

MR. CARTER: I think it would be the appropriate punishment regardless of whether it was a civilian or officer.

MR. DUBINER: That's just because it's premeditated?

MR. CARTER: Exactly.

MR. DUBINER: In a premeditated first degree murder case, then you think that the appropriate punishment is

the death penalty?

MR. CARTER: Yes.

MR. DUBINER: And you feel that way in basically all premeditated first degree murder cases. We're talking about premeditated, not other types.

MR. CARTER: Yes.

R. 842-43. Mr. Carter was challenged for cause, which the Court denied. R. 844. He was then struck using one of the defendant's peremptory challenges. R. 1207.

Ronald Nickerson demonstrated a pro-death penalty bias and his inability to follow the Court's instructions:

MR. KLEIN: I don't know whether I'm overstepping my bounds or not, but Mr. Nickerson, initially, at least, do you have any preconceptions about what kind of a case would deserve the death penalty?

Mr. NICKERSON: Most any kind of a premeditated murder deserves the death penalty.

Mr. KLEIN: You say most any kind. Do you feel so strongly about the death penalty that you think you would vote for it, for death in any kind of case where you found the Defendant guilty of premeditated murder?

Mr. NICKERSON: I probably would.

* * * *

R. 457.

THE COURT: Would you follow those instructions irregardless of your personal views? Because I am telling you, you have to follow them?

MR. NICKERSON: I, I probably would, but I did not know for sure. I would have to hear all of the evidence.

* * * *

R. 458-59. The Court denied the defendant's for cause challenges to Mr. Nickerson, R. 460, and Mr. Van Poyck used yet another peremptory challenge to strike him. R. 1283.

Similarly, Derek Miller demonstrated an unacceptable pro-death penalty bias:

THE COURT: Okay, would you agree, sir, that it is a fair statement that capital punishment or the death penalty is not an appropriate sentence in all first degree murder cases, that it depends on the case?

MR. MILLER: Right. The thing, if a person is without a doubt proven guilty, you know, for a rape or murder, I believe, you know, death ought to be the sentence.

THE COURT: In every case no matter what?

MR. MILLER: Without a doubt, yes, if it's proved without a doubt.

* * * *

R. 628-69.

MR. KLEIN: Mr. Miller, you told us before

that you would consider yourself strongly in favor of the death penalty, capital punishment?

MR. MILLER: Yes, sir.

MR. KLEIN: That is a recently-held belief or have you felt that way before?

MR. MILLER: I felt that way a long time. Feel more strongly about it because of the prison overcrowding, the taxpayers' money, you know, you know, going to house and feed those--

* * * *

R. 632.

MR. KLEIN: Would you feel that same way if you were to know that the alternative to the death penalty that a person should spend the rest of his life in prison, you as a taxpayer would have to house and feed him for the rest of his natural life, would you, would you feel hesitant to give a life recommendation under those circumstances?

MR. MILLER: Yes.

* * * *

R. 634. The Court denied the defendant's challenges for cause, R. 636, and a peremptory challenge was later used. R. 1206.

George Farmer showed both a pro-death penalty bias and a presumption that Mr. Van Poyck was guilty:

MR. KLEIN: Are there some mitigating

circumstances under those circumstances that could convince you to bring back a recommendation of life?

MR. FARMER: As opposed to the death penalty?

MR. KLEIN: Yes.

MR. FARMER: Yes, I think I would so long as you did not plan to do it, then a murder ended up happening. I mean, you plan to escape and all this stuff and you have this big plan all made up. And if somebody gets killed, it's okay; if somebody did not get it, killed, it's okay to then, that would mean you really did not plan ahead to kill somebody.

MR. KLEIN: Okay. What about --

MR. FARMER: Make sense?

MR. KLEIN: Yeah, it does, actually. What about if the case, how do you feel if the case involved the death of a prison guard, police officer, you feel the same way?

MR. FARMER: No, I guess I would have to change my mind on that.

MR. KLEIN: Okay. Why would that be?

MR. FARMER: Because these guys are trying to do a service to society and they are trying to be protected as well as they would be.

MR. KLEIN: Okay. Well, how would you feel, generally, about somebody if you knew they intentionally killed a police officer or a prison guard?

MR. FARMER: I would have to bring the death penalty.

* * * *

R. 659-61.

MR. KLEIN: From, as a result of what you have heard or heard around you, on TV about this case, you feel that Mr. Van Poyck is guilty as he sits here?

MR. FARMER: You know, I do not know what evidence you're going to bring in both directions.

MR. KLEIN: From what you have read?

MR. FARMER: From what I've read, this man is accused of this crime.

MR. KLEIN: Well, from what you read and what you think he's probably guilty?

MR. FARMER: Okay, yeah, I think he is probably guilty.

* * * *

R.662-63. The Court denied the defendant's challenge for cause, R. 665, and Mr. Van Poyck was forced to use yet another peremptory challenge. R. 1354.

Finally, Frank Aldridge demonstrated a presumption of Mr. Van Poyck's guilt, which he "hoped" he could put aside. Yet he expected Mr. Van Poyck to present evidence of his innocence:

THE COURT: What you read in the paper, did it really stick with you, I mean or did you breeze through it?

MR. ALDRIDGE: I read it in the paper Monday morning because I was coming to jury duty, it stuck in my mind.

THE COURT: That's a recapitulation or where they go back?

MR. ALDRIDGE: Uh-huh.

THE COURT: Could you disregard what you've read in that article Monday and base the verdict solely on what you hear in the courtroom and the instructions of the law that I would give you?

MR. ALDRIDGE: I don't know.

THE COURT: Have you formed an opinion as to the person's guilt or innocence based on that article in the paper? Obviously, we want a jury to find a person guilty or not guilty based on what they hear in the courtroom, not on what you read in the paper. Could you do that?

MR. ALDRIDGE: I understand that, but possibly I have formed an opinion.

* * * *

R. 696-97.

MR. KLEIN: Mr. Aldridge, as a result of what you have read, have you formed any opinion, at all, about this case or about Mr. Van Poyck?

MR. ALDRIDGE: Based on the facts presented in the newspaper, my opinion is that the defendant is guilty.

MR. KLEIN: Okay. Based upon what you read, would you have, would you, before you could bring back a verdict of not guilty would you ask for evidence, would you ask for us as defense to present evidence to persuade you otherwise?

MR. ALDRIDGE: Yes, certainly.

MR. KLEIN: Would you have a difficult time finding Mr. Van Poyck not guilty unless you heard some evidence from the defense to convince you that he was innocent in view of what you have heard?

MR. ALDRIDGE: Yes, in view of what I have read, yes.

THE COURT: Mr. Aldridge, let me ask you something. If I instructed you under the law of our country, that under the constitution Mr. Van Poyck as he sits here right at this moment is presumed innocent and that presumption stays with him until the time the state presents evidence sufficient for you to find him guilty beyond a reasonable doubt, would you be able to follow instructions?

MR. ALDRIDGE: I would hope that I could.

* * * *

R. 703-04.

THE COURT: Would you be able to follow that if you were a juror and not form an opinion or fix in your mind

a verdict until you have heard all the evidence in the courtroom?

MR. ALDRIDGE: I would hope that I could.

* * * *

THE COURT: Also, under our system the defendant in any criminal case is not required to testify nor present evidence. The reason for that is that the burden of proof in a criminal case is on the state, not on the defense. Would you agree with that?

MR. ALDRIDGE: Yes.

THE COURT: Would you be able to do that even if you read the papers?

MR. ALDRIDGE: I would hope that I could.

* * * *

R. 705. The Court denied Mr. Van Poyck's motion to strike Mr. Aldridge for cause, R. 706, and Mr. Van Poyck used a peremptory challenge to prevent him from sitting. R 1132.[7]

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[7] Mr. Aldridge's comments were similar to those in Huber v. State, 669 So.2d 1079, 1081 (Fla. 4th DCA 996), where a potential juror said he could not presume the defendant innocent but then recanted that statement. The Court held that the juror did not show the required impartiality: "[w]hen a juror Admits that he 'probably' would be prejudiced but says he 'probably' could follow the Judge's instructions, it is error for the trial judge to refuse to dismiss him for cause." Id. at 1081; see also Jones v. State, 660 So.2d 291, 292 (Fla. 2d DCA 1995). Here, Mr. Aldridge made virtually undistinguishable comments and should have also been struck for cause.

Finally, Mary Bradford was challenged for cause, which challenge was denied. R. 871, 873. As a result, this objectionable juror actually sat on Mr. Van Poyck's jury. Had Mr. Van Poyck received the additional peremptories he should have received, he would have struck this objectionable juror.

Although most of the jurors discussed above eventually said they would follow the Court's instructions, such responses did not render them unobjectionable; the equivocal nature of their responses as a whole raised a reasonable doubt as to their impartiality. In fact, defense counsel Michael Dubiner moved to strike the entire panel based on death qualification. R. 1368-69. This motion was denied. The trial court thus erred in not striking the jurors for cause.

2. The Trial Court Improperly Denied The Defendant An Additional Peremptory Challenge.

After exhausting his peremptory challenges, most of them on jurors who should have been struck for cause, Mr. Van Poyck moved to strike Goldie Moody for cause, which the Court denied. R. 1360. Mr. Van Poyck's trial counsel then asked the Court for an additional peremptory challenge so he could strike Ms. Moody. R. 1363. The Court said that it would only grant an additional peremptory challenge if Mr. Van Poyck waived one of his other rights - - the right to conduct voir dire on a juror the court wanted to disqualify "for cause."

MR. DUBINER: Do we get the additional peremptory?

THE COURT: I am going to make a bargain with you, that the Appellate Court won't like if it ever gets up there. I will go along with that, if that guy Chase gets up there, he goes for cause. That's the guy in the methadone program.

MR. KLEIN: We cannot agree until we examine him. Other than the fact he's on methadone --

THE COURT: That guy has not been in here ten minutes. He has been in and out of the revolving doors.

I am going to bump him if he gets up here .....

* * * *

R. at 1364.

MR. KLEIN: We cannot live with the court's opinion. Mr. Chase, I think is his name, going in and out of the court, we will excuse him for cause at that point. We cannot live with that. We'd just as soon withdraw our motion for extra peremptories at this point rather than have Mr. Chase summarily removed for cause.

* * * *

R. 1365.

A defendant has a right to conduct individual voir dire of a juror that is being struck for cause. O'Connell v. State, 480 So.2d 1284, 1286-87 (Fla. 1985); see also Boggs v. State, 667 So.2d 765, 768 (Fla. 1996); Hernandez v.State, 621 So.2d 1353 (Fla. 1993); Green v. State, 575 So.2d 796 (Fla. 4th DCA 1991). In O'Connell, the trial court struck a juror for cause and d denied defense counsel's objection that he had had no opportunity to first examine the juror. The Supreme Court cited Florida Rule of Criminal Procedure 3.300(b), which allows both sides to examine prospective jurors orally. It then recognized that "there may be situations where the trial court is justified in curtailing voir dire, [and where] it has

considerable discretion in determining the extent of counsel's examination of prospective jurors." 480 So.2d at 1286 (internal quotations and citations omitted). However, the trial court's decision in O'Connell could not be viewed as an "exercise of control of reasonably repetitious and argumentative voir dire questioning." Id. (internal quotations and citations omitted). The court thus erred, requiring a new trial.

Similarly in Green, supra, the trial court had struck two jurors who expressed doubt about their ability to be impartial. The Court of Appeals held that the trial court erred in striking the jurors without permitting defense counsel to question them because its decision could not be categorized as the discretionary avoidance of repetitive or argumentative voir dire. 575 So.2d at 797.

Here, the trial court refused to allow the defense to conduct voir dire of Mr. Chase, whom it said it intended to strike for cause, by conditioning the defendant's request for additional peremptory challenges on his waiver of his right to conduct voir dire of another juror before he was struck. This was error: as in O'Connell and Green, the trial court's refusal to allow any questioning cannot be considered an exercise of the court's discretion to control repetitive or argumentative questioning. Mr. Van Poyck's trial counsel had not posed any questions to Mr. Chase and was told he would not be allowed to do so. Thus, by conditioning the requested additional peremptory challenges, which was Mr. Van Poyck's right, on his waiver of another right, the trial court effectively denied the additional peremptory challenge. As a result, at least two objectionable jurors, Goldie Moody and Mary Bradford,[8]

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[8] Although Mr. Van Poyck did not specifically ask for an additional peremptory challenge to use on Ms. Bradford, the court's prior denial of his challenge to her for cause and the

actually sat on Mr. Van Poyck's jury. Thus, all the elements of reversible error was present in this case. The only remaining issue is ow that reversible error was presented by appellate counsel.

B. Appellate Counsel's Performance Constituted Ineffective Assistance Of Counsel

In order to prove ineffective assistance of appellate counsel, Mr. Van Poyck must demonstrate "(1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance; and (2) the deficiencies of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Williamson v. Dugger, 651 So.2d 84, 86 (Fla. 1994), cert. denied, 116 S.Ct. 146 (1995), quoting Johnson v. Wainwright, 463 So.2d 207 (Fla. 1984). While appellate counsel is not required to raise every conceivable argument on appeal, he must present errors "which worked some detriment to the defendant or violated any of his substantive or prodecural rights." Johnson, 463 So.2d at 211.

1. Appellate Counsel's Performance Was Deficient.

Here, appellate counsel rendered ineffective assistance in a very specific, and egregious manner: he identified the wrong jurors and then compounded the error by failing to adequately argue the issue in any depth, with any discussion, analysis or citations to any relevant authority. As a result this Court on direct appeal rejected the argument, specifically because the jurors who were identified (i.e., the wrong jurors) subsequently had been struck "for personal reasons."

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court's proposed "deal"would have made it a futile request.

In the direct appeal, counsel's brief claimed that denials of "for cause" challenges to two jurors were erroneously denied. The argument regarding the improper denial of challenges for cause consisted of one sentence:: "In two instances, Brousette [sic] (R. 812-825) and Abefarmis (R. 741-750), denial of the defendant's motions to strike for cause was error." (Direct Appeal Brief, App. 1, p. 58). Appellate counsel provided no argument or discussion on this issue, no legal authority relevant to the issue and pointed to no objectionable juror who was permitted to sit on Mr. Van Poyck's jury.

Instead, appellate counsel referenced two jurors who, although unsuccessfully challenged for cause, were later excused by the Court for personal reasons. This erroneously implied that Mr. Van Poyck did not have to use any of his peremptory challenges on those jurors and they did not sit on his jury. They therefore did not support the argument.

Following the filing of the initial brief, appellate counsel's colleague filed a notice of intent to rely on additional authority, App. 2, which cited, among others, a few cases discussing the erroneous denial of for cause challenges and requests for additional peremptory challenges. This notice did not indicate which arguments any of the cited cases supported or any discussion of the cases and their applicability. This obviously did not cure the problem with the wrong identification -- and did not cure the previous lack of argument either. See Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985) (descriptive listing of cases without application to facts of case was deficient).

Unlike the "inventive and highly technical" argument involved in Johnson, the argument in this case was obvious from the Record and straightforward. Indeed, its merit was

recognized by the trial court even as it committed error -- it recognized that its "bargain" was something the Appellate Court "won't like." R. 1364. The trial court's reticence was well-founded-- the argument was based on recent, controlling case law, including Hill, 477 So.2d 553 (Fla. 1985) and O'Connell, 480 So 2d 1284 (Fla. 1985), both of which had decided well before the direct appeal. See State v. Stacey, 482 So.2d 1350, 1351 (Fla. 1985) (counsel was ineffective in failing to research and raise case law showing clear constitutional error based on existing authority)

Finally, the issue of impartial jury selection is one of paramount importance and cannot be ignored. In Wilson, 474 So.2d at 1163-64, the Court found appellate counsel deficient for failing to raise the sufficiency of the evidence for the jury's finding of premeditation and cursorily arguing the appropriateness of the death penalty, both of which it found were fundamental issues. The issue of the jury's impartiality and errors in the jury selection phase cannot be considered any less important than the issues deficiently raised (or not raised at all) in Wilson. [9]

2. Appellate Counsel's Deficient Performance Prejudiced The Defendant.

Appellate counsel's deficient performance clearly prejudiced Mr. Van Poyck and undermines any confidence in the appellate process, thus requiring that the writ be granted.

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[9] Nor can Appellate counsel's failure to adequately and correctly present this claim be considered tactical: counsel attempted to raise the error, but did so with no analysis and, worse yet, named the wrong jurors. His failure to raise this issue adequately must be found to fall below the norm of acceptable representation.

As a direct result of appellate counsel's deficient performance Mr. Van Poyck was deprived of the new trial and new penalty phase which he would have received on direct appeal had counsel's performance not been deficient. Van Poyck was denied a trial by a fair and impartial jury and absent appellate counsel's inexplicable failure to properly brief this issue Mr. Van Poyck would have received the new trial to which he was entitled. Certainly this Court cannot countenance an important appellate issue, in a capital case, which consisted of one sentence, devoid of supporting case law, and which named the wrong jurors. The naming of the wrong jurors alone resulted, inevitably, in rejection of the argument by this Court:

> "[w]e note, that although the pro-death jurors should have been excused for cause, the trial judge subsequently excused them for personal reasons. Consequently, Van Poyck was not required to exercise any peremptory challenges with regard to those jurors and that issue s moot." Van Poyck v. State, 564 So.2d 1066, 1071 (Fla. 1990).

It is telling that the Court found that the two jurors named in the direct appeal should have been struck for cause. i.e. reversal was not required only because they were subsequently struck for "personal reasons." The voir dire responses of the jurors who should have been named are virtually indistinguishable in content from those two named jurors, or jurors this Court held should have been struck in the cases cited above; this leads to the inescapable conclusion that, had the correct jurors been named, and had any kind of coherent argument been made, this Court would have found error in the trial court's denial of any number of Mr. Van Poyck's "for cause" challenges and in denial of additional peremptory challenges. This undermines any confidence in the

appellate process and mandates either a new trial (as to those jurors who expressed a belief in Mr. Van Poyck's guilt: Busto, Farmer and Aldridge) or sentencing hearing (as to those jurors who were biased towards the death penalty: Busto, Moker, Carter, Nickerson, Miller and Farmer). [10] The trial court's error in refusing to grant a challenge for cause can never be harmless error. Hill, 477 So.2d at 556.

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[10] See Reilly v. State, 557 So.2d 1365, 1367 (Fla. 1990); Huber, 669 So.2d at 1083 (new trial ordered when jurors not struck who presumed defendant guilty). See, e.g., Hill, 477 So. 2d at 556 (new sentencing hearing where jurors not struck who evidenced unacceptable pro death penalty bias).

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,

Petitioner,

vs. Case No. 89,870

HARRY K. SINGLETARY, JR.

Respondent.

_____/

PETITIONER'S MOTION FOR REHEARING AND/OR CLARIFICATION

This Court properly condemned trial court's deal as improper but failed to properly apply it to the Petitioner's habeas corpus appeal.

This Court held that Van Poyck's challenge as to one of the two (2) challenged jurors who actually sat on his jury "was not preserved for direct appeal.....because Van Poyck's trial counsel did not identify her as a venireperson whom he wanted to excuse through an additional peremptory challenge." Slip opinion at page 3, footnote 3. The Court was apparently referring to juror Bradford. However, the court has overlooked the fact that when trial counsel identified juror Moody and requested an additional peremptory, the trial court refused that request and then countered with its improper and unorthodox offer of as "deal." The trial court made it clear that any additional peremptories were contingent upon defense counsel accepting this "deal." This Court properly condemned this deal as improper, Slip opinion at page 1, footnote 2. However, the Court has overlooked the fact that once defense counsel rejected this "deal" it was clear that it was futile to continue naming objectional jurors.

The trial court made it clear that it would only grant additional peremptories if counsel accepted the deal. This improper counteroffer suffocated further inquiry and debate by Petitioner's trial counsel. Counsel made it clear that such a deal was unacceptable, and this Court agreed that it was improper. Under such circumstances, defense counsel should not be required to continue the debate where it is apparently futile. By unsuccessfully challenging juror Bradford for cause, Van Poyck had adequately identified her as "objectionable." It was clear that no further peremptories would be granted unless defense counsel agreed to the improper "deal," and since defense counsel refused the deal, there remained nothing more

for him to do. Any waiver or procedural default was clearly invited and created by the trial court's injection of this "deal" into the equation.

In holding that there was no ineffectiveness of appellate counsel, this Court did not individually analyze the two (2) prongs of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). This Court merely concluded that "we find that Van Poyck's appellate counsel did not render ineffective assistance for failing to pursue and argue Van Poyck's claim that the other seven venirepersons were biased or prejudiced." Slip opinion at page 6. Left unanswered is whether this Court is holding that appellate counsel's omissions and deficiencies did not rise to the level of constituting a substantial deficiency or of failing outside the range of professionally acceptable performance (the first prong of Strickland); or, whether this Court is holding that counsel's performance was deficient but that Van Poyck has failed to demonstrate prejudice flowing therefrom (the second prong of Strickland). Petitioner respectfully moves for clarification of this holding.

In order to hold that none of the challenged jurors were biased or objectionable, this Court took the highly unusual step of revisiting Van Poyck's direct appeal decision from 1990, and "reexamining the record." The Court reversed its unanimous 1990 holding that jurors Abufaris and Bruschi were clearly biased on objectional, and in an about face, declared that they were unbiased and unobjectionable. Apparently this was necessary because the responses of the seven (7) challenged jurors in the habeas petition were virtually identical to, or even more egregious than the responses of jurors Abufaris and Bruschi, whom the court had already declared, in 1990, were clearly_ biased and should have been excused for cause. Besides the clear violation of the "law of the case" doctrine by the majority, as already set forth in the dissenting opinion at

page 13, Van. Poyck submits that this Court has clearly violated one of the most settled principles of the standard of review for ineffective assistance of counsel. Strickland v. Washington, *supra*, clearly and repeatedly teaches that in evaluating a claim of ineffective assistance courts must "avoid the distorting effect of hindsight." Rather,

> a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.

466 U.S. at 690 (emphasis added). In Kimmelman v. Morris, 477 U.S. 365, 381, 106 S.Ct. 1574, 2586 (1986), the Court reiterated that

> The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error. .....

Thus, in evaluating this claim, this Court must take the perspective of 1990, not 1998. Van Poyck is entitled to have the underlying claim reviewed under the standard that existed in 1990. Had counsel properly briefed this issue in 1989-1990, then this Court, in 1990, would have found error and would have granted Van Poyck a new trial and/or new sentencing hearing. This is known because in 1990 this Court unanimously held that jurors Abufaris and Bruschi were clearly biased, objectionable, and should have been struck for cause. The other challenged jurors, not brief on direct appeal, gave identical or ever worse responses. Clearly, in 1990, this Court would have also found that these jurors should have been struck

for cause. It is only now, in 1990, under a new standard, that this Court now reaches a contrary result. However, had Van Poyck received the effective assistance of counsel to which he was entitled in 1990, the result would have been different. Thus, this Court is employing "the distorting effect of hindsight" forbidden by Strickland.

In order to prevail under his claim of ineffective assistance of counsel, Van Poyck's burden is to establish that there is "a reasonable probability" that the outcome would have been different had the issue been briefed on appeal in 1990. Strickland, *supra*, at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. See Groover v. Singletary, 656 So.2d 424 (Fla. 1995) (The question is "whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.") ; Johnson v. State, 593 So.2d 206, 209 (Fla. 1992) (A defendant must show a reasonable probability that, absent the deficient performance, the outcome would have been different. In Agan v. Singletary, 12 F.3d, 1012 at 1018 (11th Cir. 1993), the Court described the standard thusly:

> This "reasonable probability" of a different result is simply a probability sufficient to undermine confidence in the outcome of the case; a standard less than proof by a preponderance of the evidence. (Emphasis added).

In order to prevail on his claim Van Poyck is only required to demonstrate that there is a reasonable probability that, had this issue been properly briefed in 1990, the outcome

would have been different. This Court's opinion is totally lacking in the proper ineffective counsel analysis (which is the claim before the Court) and instead treats this case as if the underlying claim is before this Court on direct appeal. This is not the correct standard. Van Poyck submits that under Strickland he has met his burden and is entitled to a belated direct appeal.

APPENDIX C

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT,
CRIMINAL DIVISION
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

vs. CASE NO: 87-6736 CF A02
88-11116 CF A02

WILLIAM VAN POYCK,

Defendant.

_____/

VOLUME VII

JURY TRIAL

BEFORE THE HONORABLE MICHAEL MILLER

- - - -

Room 315
Palm Beach County Courthouse
West Palm Beach, Florida
Tuesday, November 1, 1998
Beginning at 1:30 o'clock, p.m.

THE COURT: You can step outside, sir. (Whereupon, Mr. Engle left the jury room.)

MR. GEESEY: No motion from the State.

MR. DUBINER: Nothing from the Defense.

THE CLERK: 518, Mary Bradford.

THE COURT: Have a seat, ma'am, how are you doing today?

MS. BRADFORD: All right, thank you.

THE COURT: We're here, ma'am, on the case entitled State of Florida versus Van Poyck. This is Mr. Van Poyck. This is Mr. Klein, that's Mr. Dubiner. The State is represented by Mr. Geesey and Miss Skiles.Ma'am, do the names Van Poyck, Valdez or O'Brien mean anything to have you read or heard anything in the news media concerning an incident where allegedly two people went to the doctor's office in West Palm Beach and attempted to remove a third person from custody and in the process a guard died?

MS. BRADFORD: I think I remember hearing something like that.

THE COURT: Obviously, didn't stick with you in great detail if it did?

MS. BRADFORD: I cannot really -- just something that's familiar.

THE COURT: Nothing that would cause you to have any preconceived notions or thoughts about a trial?

MS. ENGLE: I don't think so.

THE COURT: Would you agree that if a person is tried for a crime in this country that should be tried and either found guilty or not guilty based on the evidence received in the court of law and on the instructions of the law to the jury, not on what you hear from a news media source?

MS. BRADFORD: Yeah.

THE COURT: Ma'am, if a person is convicted of first degree murder, there could be a second hearing. At that hearing a jury would hear aggravating and mitigating circumstances and the instructions on the law as to what those mean. The jury would then take a vote and recommend a penalty to the judge. The recommendation would either be for life in prison

or death. The recommendation is one which carries very great weight, but the Court is the one that imposes the penalty.
If you were asked to tell your view on the death penalty, would you classify yourself as strongly in favor, strongly against, middle of the road or never thought about it much?

MS. ENGLE: I don't know what you mean by middle of the road. But I feel there are some circumstances that a person should be required to give their life for it.

THE COURT: Would you say then there are some that were and the requirement depends on the circumstances?

MS. BRADFORD: Yes.

THE COURT: Okay, would you agree, ma'am, there could be a set of circumstances where you could hear the trial if the person is found guilty of first degree murder, that you then go to the penalty phase and heard that evidence, the instructions on the law, and you, personally, could say from everything I have heard it sounds like I should recommend a penalty

of death. Could you personally do that as one of12 jurors making a recommendation?

MS. BRADFORD: Yes.

THE COURT: Would you agree that you also could make a recommendation of life in prison?

MS. BRADFORD: Yes.

THE COURT: Okay, Mr. Geesey.

MR. GEESEY: Ma'am, from your answers there is a little bit of hesitation there, but do you feel you could in the appropriate case recommend that a person be put to death?

MS. BRADFORD: Yes. It would be difficult, but I would have to definitely consider, consider it, but, yes.

MR.GEESEY: You believe that you could do that?

MS. BRADFORD: (Nods in the affirmative.)

MR. GEESEY: I think you agree it would not be fair to a Defendant if a jury were to recommend death in every case, right, that goes without saying?

MS. BRADFORD: I don't understand.

MR. GEESEY: It would not be fair to a Defendant if a jury were going to recommend death in each and every case of first degree murder. Do you agree with that?

MS. BRADFORD: Yes.

MR. GEESEY: And do you also agree it would not be fair to the State of Florida if a jury were going to recommend life in each and every first degree murder case?

MS. BRADFORD: Yes.

MR. GEESEY: Okay. So, what we're asking is for you to make a decision, make a recommendation to this Court based upon the law and based upon the facts of this particular case?

MS. BRADFORD: Yes.

MR. GEESEY: You believe you could do that?

MS. BRADFORD: Yes.

MR. GEESEY: Okay, hypothetically, if the case involves a killing, intentional killing of a law enforcement officer, could you set aside your personal feelings and make a recommendation to the Court

based upon the law the judge gives you?

MS. BRADFORD: Yes.

MR. GEESEY: Regarding anything that you have heard about this case, if anything comes back to you, you could put that out of your mind and again reach a decision based upon the evidence presented at trial and to that evidence alone?

MS. BRADFORD: That's my responsibility, yes.

MR. GEESEY: Okay, thank you, ma'am.

THE COURT: Mr. Dubiner?

MR. DUBINER: If I could ask you a couple of questions.

MS. BRADFORD: Uh-huh.

MR. DUBINER: Have you thought much about the death penalty?

MS. BRADFORD: Yes.

MR. DUBINER: Are there certain types of cases that you have thought about where you think the death penalty would be appropriate most times or all of the time?

MS. BRADFORD: Yes.

MR. DUBINER: Could you tell us those types of cases?

MS. BRADFORD: Where there was complete -- it's hard to express myself right now.

MR. DUBINER: You can calm down.

MS. BRADFORD: Just real lack of concern for human life.

MR. DUBINER: You have heard the term premeditated?

MS. BRADFORD: Yes.

MR. DUBINER: Have you thought about premeditated killing where somebody kills with premeditation, what you think about the death penalty in regards to that?

MS. BRADFORD: I think that one of the things that, that I feel that is that the death penalty is there for.

MR. DUBINER: Okay. Do you think that if premeditation was proven beyond a reasonable doubt that you would vote for the death penalty in every case where there was premeditation proven?

MS. BRADFORD: Yes, I guess.

MR. DUBINER: Okay, I don't have anything further, thank you.

THE COURT: Ma'am, do you agree that if you were on a case as a juror and premeditated murder was proven and the person was found guilty of that, that you would follow the instructions on the law and listen to the evidence on the aggravating and mitigating circumstances and base your recommendation on that evidence and those instructions rather than just a blanket saying of death?

MS. BRADFORD: Yes, yes.

THE COURT: Don't believe that every premeditated murder case automatically means it's a death recommendation?

MS. BRADFORD: That's, that's, you know, would be my number one concern is to follow the law and what, what you said.

THE COURT: Thank you.

MS. BRADFORD: I hope I appropriately answered that question.

THE COURT: We just want to know that you feel yourself. You cannot say anything wrong. There is no right or wrong answer.

MR. DUBINER: I would like to follow up just with a couple of questions or two.

THE COURT: All right.

MR. DUBINER: In terms of premeditation if that is proven beyond a reasonable doubt, what, what are your feelings with regards to that, the death penalty and premeditation? Certainly, I want to find out.

MS. BRADFORD: I guess I am not understanding your question real well. I guess what I said, real disregard for human life.

MR. DUBINER: If that is shown do you feel that if a disregard for human life is shown, do you think that the death penalty is always appropriate in that type of case? I know I'm putting you on the spot.

MS. BRADFORD: I guess what I am thinking, I would have to know more about what the case was, but, you know, to me a real blatant disregard for human life is, is to me, you know, worth the death penalty.

MR. DUBINER: I don't have anything further.

THE COURT: You can step outside, ma'am. Thank you.
(Whereupon, Miss Bradford left the jury room.)

THE COURT: Any motion by the State or the Defense?

MR. GEESEY: None from the State.

MR. DUBINER: We would move to challenge her for cause, Judge.

THE COURT: Denied.

THE CLERK: 515, Marianne. Botka.

THE COURT: Hi, Miss Botka, how are you today?

MS. MOODY: Yes.

MR. GEESEY: Thank you very much.

MR. KLEIN: Miss Moody, as a result of what you have heard about this case in the past, have you formed any impressions about who shot the prison guard or why?

MS. MOODY: I am trying to be honest and remember back, if it's even the --

frankly, nowadays you read so much about, you know, I am trying to think about it.

MR. KLEIN: Tell me what you are remembering?

MS. MOODY: What I am thinking, this might be is where someone was taken to a doctor or something and then they got out and the guard was killed. I think that may be the case. That's the one I have in mind, anyway.

MR. KLEIN: I think we're talking about the same case.

MS. MOODY: So, I do remember it vaguely.

MR. KLEIN: From what you read or heard, do you recollect anything about why the guard was shot or how he was shot or by whom he was shot?

MS. MOODY: I thought from what I am thinking back now, that he was shot because he would not give his gun away or would not give up, that the prisoner shot him because he would not give his, he would not, the guard would not let him go or something like that.

MR. KLEIN: Okay. Have you formed any

impressions, at all, about Mr. Van Poyck here, his name mean anything to you?

MS. MOODY: The name means nothing.

MR. KLEIN: Do you have any idea which one of the people?

MS. MOODY: No, I do not, no. He could have been either one of them.

MR. KLEIN: Did you read the paper this morning, the local paper?

MISS MOODY: Not this morning.

MR. KLEIN: Miss Moody, is there any kind of particular case, at all, that you think would, think warrants the death penalty in every case, in every circumstance?.

MISS MOODY: In every case and every circumstance?

MR. KLEIN: I mean is there any particular type of case?

MS. MOODY: If he were found guilty you mean?

MR. KLEIN: Uh-huh.

MS. MOODY: There are some cases I would assume they would, yes.

MR. KLEIN: You would not automatically recommend a sentence of death in every first degree murder case, would you?

MS. MOODY: No.

MR. KLEIN: Would you automatically recommend a sentence of death in every first degree murder case where the person is convicted of premeditated first degree intentional killing?

MS. MOODY: No.

MR. KLEIN: You would again weigh the mitigating and aggravating circumstances?

MS. MOODY: (Nods in the affirmative.)

MR. KLEIN: Okay. Is there, would you, assuming for a second the prison guard was shot and killed, would you automatically vote for a sentence of death because of that shot.

MS. MOODY: I find that very hard. I do not think I would.

MR. KLEIN: Okay.

MS. MOODY: But, I cannot honestly say I

would not either without --

MR. KLEIN: I guess what I am asking, are you so shocked by that that it would move you no matter what you heard in the case what arrgavating circumstances you may hear?

MS. MOODY: I don't think I would.

MR. KLEIN: Move you to recommend death automatically?

MS. MOODY: No, I don't think so.

THE COURT: Thank you, ma'am.

MS. SKILES: Thank you.
(Whereupon, Miss Moody left the jury room.)

THE COURT: Any motions, State or Defense?
MR. GEESEY: No, Judge.

MR. KLEIN: No.

THE CLERK: Number 602, James Palmer.

THE COURT: Have a seat. How are you doing? Where do you live, Mr. Palmer?

MR. PALMER: South Bay.

THE COURT: Long drive for you today.

MR. PALMER: Long drive.

THE COURT: All right, Mr. Palmer, do I know you; do you know me?.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, CRIMINAL DIVISION
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

vs. CASE NO: 87-6736 CF A02
88-11116 CF A02

WILLIAM VAN POYCK,

Defendant.

_____/

VOLUME V

JURY TRIAL

BEFORE THE HONORABLE MICHAEL MILLER

Room 315
Palm Beach County Courthouse
West Palm Beach, Florida
Monday, October 31, 1988
Beginning at 1:35 o'clock, p.m

MS. MOODY: I read about it originally when it happened. The names mean nothing.

THE COURT: That was a while back?

MS. MOODY: Uh-huh.

THE COURT: Did anything you read stick with you to the extent that you would say you would be unable to sit on the jury in this case and render a verdict on this case based solely on the evidence you hear in the courtroom and the instructions of the law?

MS. MOODY: I don't think so. Nothing I can think of.

THE COURT: Nothing really sticks with you that you read then?

MS. MOODY: No. It was a terrible thing but I do not know.

THE COURT: Safe to say you have not prejudged anybody as being guilty or not guilty for it and you would wait to judge them until you hear all of the evidence?

MS. MOODY: Yes.

THE COURT: All right, in this case if a person

is convicted of first degree murder, ma'am, they can receive one or two sentences, either life or death. And what happends in the second part of the trial, the jury hears aggravating circumstances or evidence and mitigating. What that means, and then they make a recommendation, they vote a recommendation to me of either death, life in prison, and I impose the sentence.

The recommendation is something I would strongly consider. However, would you say you are for the death penalty, against the death penalty or neutral?

MS. MOODY: If they are guilty, I am for.

THE COURT: Absolutely?

MS MOODY: If they are guilty, yes.

THE COURT: Let me ask you this. Would you follow the instructions on the law I give you if those instructions on the law say that the mitigating circumstances are such you should recommend life, would you do that?

MS. MOODY: Yes.

THE COURT: Then the opposite, if you heard the evidence and the instructions on the law said aggravating circumstances, or such you should recommend death, would you do that?

MS. MOODY: Yes.

THE COURT: In other words, you do not feel you would do one automatically or the other automatically, you would listen to all of the instructions on the law?

MS. MOODY: Uh-huh.

MR. GEESEY: Ma'am, would you be fair to both sides then?

MS. MOODY: Yes.

MR. GEESEY: 'Cause it would not be fair to the State if the jury recommended life in every case. It would not be fair to the Defendant if the jury recommended death in every case. That wouldn't be right, would it?

MS. MOODY: No, it would not, but I would expect that, in other words, I am listening to the judge and the evidence.

MR. GEESEY: That's what you would make your

decision on.

MS. MOODY: Yes.

MR. GEESEY: At the end of the trial, based upon his instructions and the evidence that has been presented to you?